No. 108

By a Pro. Error

SUPREME COURT OF THE UNITED STATES

Writ of Error to Appeal

OCTOBER TERM, 1901.

No. 108.

SIMON ROTHSCHILD et al.,

Plaintiffs in Error

vs.

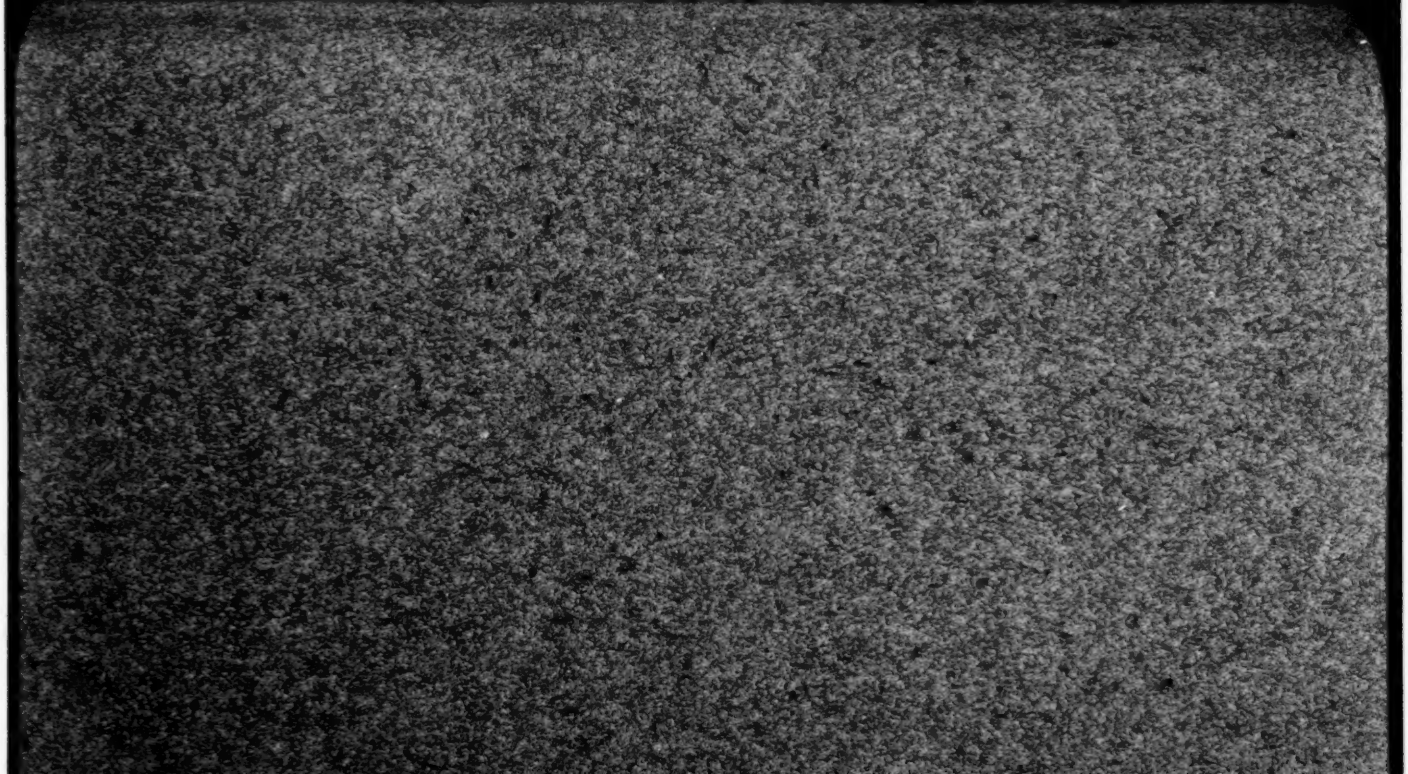
ROBERT A. KNIGHT,

Assignee in Insolvency of James McKeon.

BRIEF FOR DEFENDANT ON DEFENDANT'S MOTION TO DISMISS OR AFFIRM.

Submitted October 21, 1901.

CHARLES M. RICE,
ROBERT A. KNIGHT.



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SIMON ROTHSCHILD ET AL., PLAINTIFFS IN ERROR,

vs.

ROBERT A. KNIGHT, ASSIGNEE IN INSOLVENCY OF JAMES McKEON, DEFENDANT.

BRIEF FOR DEFENDANT ON DEFENDANT'S MOTION TO DISMISS OR AFFIRM.

STATEMENT OF FACTS.

This is a writ of error to the Superior Court of Massachusetts. The original action in said Superior Court was an action of tort by the defendant, who was and is the assignee in insolvency of one McKeon, to recover the value of goods alleged to have been conveyed by McKeon to the plaintiffs in error (there the defendants) in fraud of the insolvency laws of Massachusetts. The answer was a general denial. The defendant in error (there the plaintiff) had a verdict, and the case was taken by the plaintiffs in error (there the defendants) on exceptions, to the Supreme Court of Massachusetts.

[Record, pp. 14, 16-18, 21-3, 25-63.]

No Federal questions were raised by the pleadings or otherwise in the Superior Court, or by said exceptions.

Said exceptions were overruled by the Supreme Court.

[Record, p. 63.]

The present plaintiffs in error, then, *after the final judgment* rendered in the Superior Court, March 6, 1899 [Record, pp. 54, 56], brought a writ of error to the said Superior Court in the Supreme Court of Massachusetts.

[Record, pp. 6, 7-13.]

Some of the assignments of error accompanying said writ of error alleged infringements of the rights of the plaintiffs in error under the fourteenth amendment of the Constitution of the United States, but it is submitted, and will be argued hereafter, that Federal questions were raised then for the *first time*, and when it was *too late*, and, moreover, that said assignments of error are not part of the Record in this case, and cannot here be considered at all, and cannot therefore give this Court jurisdiction in the present case.

[Record, pp. 8-9, 60-1.]

The writ of error brought as aforesaid in the Supreme Court of Massachusetts was heard by a single justice thereof, and reported to the full bench.

[Record, pp. 2-5.]

where the judgment in the Superior Court was affirmed.

[Record, pp. 63-6.]

The present writ of error was then brought *to the Superior Court* of the State of Massachusetts in this Supreme Court of the United States, and an assignment of errors filed therewith.

[Record, pp. 1-2, 60-1.]

POINTS AND AUTHORITIES.

The Motion to Dismiss.

I.

No Federal questions were ever raised in the Superior Court, or on exceptions, or until after the final judgment in

the Superior Court of Massachusetts, and such questions could not, after said final judgment, be then raised for the first time, so as to authorize this Court to review the decision of said Superior Court.

The following cases support the above proposition as a matter of law:

TURNER VS. RICHARDSON, 180 U. S. 87 (91-2).
SCUDDER VS. COMPTROLLER of N. Y., 175 U. S. 32 (36).
CITIZENS' SAV. BANK VS. OWENSBORO, 173 U. S. 636 (643).
MEYER VS. RICHMOND, 172 U. S. 82 (92.)
CALIFORNIA NAT. BK. VS. THOMAS, 171 U. S. 441 (446).
FOWLER VS. LAMSON, 164 U. S. 252 (255).
TEXAS &C. R. CO. VS. S. PACIFIC CO., 137 U. S. 48 (53).
LOEBER VS. SCHROEDER, 149 U. S. 580 (585).
BUSHNELL VS. C. M. CO., 148 U. S. 682 (689).
LEEPER VS. TEXAS, 139 U. S. 462 (467-8).

A.

That no Federal questions were ever raised, or intended to be raised, in the case in the Superior Court, or on the exceptions taken to the Supreme Court of Massachusetts, will be clear from an inspection of the Record:

a. See the original pleadings. [Record, pp. 16-8, 21-3.] The answer was merely a general denial [Record p. 22], and no Federal question was raised.

b. See the exceptions taken by plaintiffs in error (there the defendants). All these exceptions but one were confined merely to objections to the admission of evidence, said exceptions being:

(1) As to the admissibility of the testimony of Lillian Dietz, employed by McKeon, in regard to the value of the goods in question, to which testimony plaintiffs in error objected on

the ground she was not qualified to give her opinion as to value. [Record, p. 33];

(2) As to the admissibility of the testimony of the present defendant in error as to the fair value of the accounts on McKeon's books against his customers. [Record, p. 34];

(3) As to the admissibility in evidence of affidavits of Simon Rothschild and B. F. Einstein and Frank Rothschild, Jr. [Record, pp. 34, 37, 40];

(4) As to the admissibility of testimony of present defendant in error regarding a conversation in New York between himself and Frank Rothschild, Jr., the general agent of plaintiffs in error, wherein he stated that Rothschild offered him the dividend which would come to plaintiffs in error, if their claim was proved in the Massachusetts Insolvency Court, if he would drop the suit in the Superior Court. [Record, p. 49];

(5) As to request of present plaintiffs in error, when all the evidence was in, that the court would rule "that there was no evidence to warrant the finding that McKeon intended to prefer them (there the defendants), or intended to prevent the property from coming into the possession of the assignee, or from being distributed according to the laws relating to insolvency, and that the action could not be maintained." [Record, p. 53.]

In all these exceptions, no Federal questions were raised, or intended to be raised, as is evident from an inspection of them. Only exceptions (1) and (3) [above] were argued. [See c. below.]

c. See the opinion of the Supreme Court in passing upon the exceptions. [Record, pp. 62-3.]

Only the exceptions relating to the testimony of the witness Dietz, and the admissibility of the affidavits were argued [See (1) and (3) above], as is stated by the court.

Here, also, there is no trace of any Federal question.

As to Federal questions, what they must be and how raised, see

WATER POWER CO. vs. ST. R. Co., 172 U. S. 475 (488).

B.

Final judgment was rendered in the Superior Court March 6, 1899 [Record, pp. 54, 56], and subsequently on April 25, 1899, the present plaintiffs in error brought the writ of error to the Massachusetts Supreme Court. [Record, p. 6.]

It does not even appear from the Record that any bond was filed with said writ of error; which, if filed, might operate as a *supersedeas* upon execution under said judgment. [See Mass. Public Statutes, c. 187, Sect. 5.]

It is, therefore, respectfully submitted that, under the above considerations, the proposition stated under I (above) is applicable to the case at bar, and of itself conclusively shows that no Federal questions were ever raised in time to authorize this Court to review said decision of the Superior Court of the State of Massachusetts, and the present writ of error must be dismissed.

II.

The proceedings under the writ of error to the Superior Court, brought in the Massachusetts Supreme Court [see Record pp. 2-13, 63-6] are not properly a part of the present Record in the case, and will not be considered by this court under the present writ of error to said Superior Court. Hence the true Record shows no Federal questions ever raised before they were raised in this Court by the present assignment of errors [Record, pp. 60-1], and the proposition stated under I above applies to the present case a fortiori.

A.

It is respectfully submitted that, in a writ of error from this court to the *Superior Court* of the State of Massachusetts, which is the present case, proceedings under the writ of error which was brought in the *Supreme Court* of Massachusetts, cannot be considered. Such proceedings could only be

considered under a writ of error from this court to the *Supreme Court* of Massachusetts.

For, in order to give this Court jurisdiction of this writ of error to the Superior Court of Massachusetts, it must appear affirmatively that a Federal question was presented for decision by said Superior Court.

WATER POWER CO. VS. ST R. CO., 172 U. S. 475 (488).
EUSTIS VS. BOLLES, 150 U. S. 361 (366).
HARRISON VS. MORTON, 171 U. S. 38 (47).
MO. PAC. R. VS. FITZGERALD, 160 U. S. 556 (576).
FOWLER VS. LAMSON, 164 U. S. 252 (255).
CAL. POWDER WKS. VS. DAVIS, 151 U. S. 389 (393).
COOK CO. VS C. & C. CANAL & D. CO., 138 U. S. 635 (651).

But as shown under I (above) it does not appear that any Federal questions were raised, or attempted to be raised, by the exceptions taken in said Superior Court, or previously in the trial of the case, or until after final judgment, and the assignment of errors which was filed in the Massachusetts Supreme Court [see Record, pp. 8-9] under the writ of error brought in *that* court is immaterial, and cannot here be considered as a part of the Record, under the above rule which said decisions establish.

The assignment of errors in the present case [see Record, pp. 60-1] is an attempt to inject into the Record *Federal questions not lawfully found therein.*

See CITIZENS' SAV. BANK VS. OWENSBORO, 173 U. S. 636 (643).

B.

None of the questions raised in the assignment of errors accompanying the said writ of error brought in the Massachusetts Supreme Court will be considered at all by this Court, since, for the reasonsstated above (II, A), said assignment of errors, though printed at pages 8-9 of the Transcript of the Record, is not properly a part of the *true Record.*

The Record is the sole guide.

This Court, for the purpose of examining the case, will depend solely upon the true Record of the Superior Court of the

State of Massachusetts, and *anything not properly a part of this Record will not be considered.*

WARFIELD VS. CHAFFE, 91 U. S. 690 (692).
REDFIELD VS. Y. I. CO., 110 U. S. 174 (176).
STRUTHERS VS. DREXEL, 122 U. S. 487 (491).
RED RIVER CO. VS. SULLY, 144 U. S. 209.
UNITED STATES VS. TAYLOR, 174 U. S. 695 (700).

and see:

OCEAN INS. CO. VS. POLLEYS, 13 Pet. 157 (165).
INGLEE VS. COOLIDGE, 2 Wheat. 363 (368).
LESSEES OF FISHER VS. COCKERELL, 5 Pet. 248 (254-259).
Speare on the Law of the Federal Judiciary, pp. 547-8.

C.

But even if said assignment of errors could be taken into consideration, the errors set forth, so far as relating to Federal questions, are in too general a form to properly raise a Federal question. [Record, pp. 8-10.]

CLARK VS. MCDADE, 165 U. S. 168 (172–3).

III.

CONCLUSION.

It is therefore respectfully submitted that this Court has no jurisdiction of the present writ of error, since the Record shows (1) that no Federal questions were ever raised until after final judgment in the Superior Court, and (2) that the true Record shows no Federal questions ever raised even till the assignment of errors in this Court [Record, pp. 60-1] since, as shown under II, the assignment of errors filed in the Massachusetts Supreme Court [Record, pp. 8-9], and the other proceedings under the writ of error brought in that court, will not be here considered as a part of the Record before this Court in considering the present writ of error.

The motion to dismiss, therefore, ought to be granted.

IV.

The Motion to Affirm.

If the motion to dismiss be not granted, and if it be held that the proceedings under the writ of error brought in the Massachusetts Supreme Court (Record, pp. 2-14, 63-6) can be considered as a part of the true Record now before this Court for consideration in the present case, then, although the Record may show that this Court has jurisdiction, yet it is manifest that the question on which jurisdiction depends is so frivolous as not to need further argument.

Although "further argument" is alleged unnecessary in the motion above referred to, yet it may not be improper to direct the attention of the Court, if the defendant may be permitted to do so, in a very few words to a few points appearing in the Record which clearly seem to justify the affirmance of the judgment. They are as follows:

1. As to the first assignment of error, Record, p. 61, any grounds for Federal questions raised below are removed by the findings of fact of the Massachusetts Supreme Court, as to the attachment, and the appearance of, and service upon present plaintiffs in error. [Record pp. 2-4, and 64-6.]

See Egan vs. Hart, 165 U. S. 188 (189).

2. There was no question raised below that Massachusetts had passed any law impairing the obligation of contract [see second assignment of error, Record, p. 61], but merely that the "*judgment*" would do so [Record, p. 10], which raises no Federal question.

N. O. Waterworks vs. L. S. Co., 125 U. S. 18 (30).

3. There were in fact no such questions raised below at all, as attempted to be raised by assignments of error Nos. 3 and 4. [Record, p. 61.] The validity of no statutes was drawn in question.

4. There was no judgment of the New York Supreme Court put in evidence [see assignment of error No. 5, Record, p. 61]. See Record and opinion of the Massachusetts Supreme Court [Record, p. 66].

Respectfully submitted,

CHARLES M. RICE,
ROBERT A. KNIGHT,

for Defendant.

No. 108.

Brief of Plaintiffs in Error

SUPREME COURT OF THE UNITED STATES.

Filed Oct. 31, 1901

OCTOBER TERM, 1901.

No. 108.

SIMON ROTHSCHILD et al.,

Plaintiffs in Error,

vs.

ROBERT A. KNIGHT,

Assignee in Insolvency of James McKeon.

BRIEF FOR DEFENDANT.

CHARLES M. HOE,

ROBERT A. KNIGHT,

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 108.

SIMON ROTHSCHILD ET AL., PLAINTIFFS IN ERROR,

vs.

ROBERT A. KNIGHT, ASSIGNEE IN INSOLVENCY OF JAMES McKEON, DEFENDANT.

BRIEF FOR DEFENDANT.

STATEMENT OF THE CASE.

This is a writ of error to the Superior Court of Massachusetts. The original action in said Superior Court was an action of tort by the defendant, who was and is the assignee in insolvency of one McKeon of Springfield, Mass., to recover the value of goods alleged to have been conveyed by McKeon, when insolvent, to the plaintiffs in error (there the defendants), both of New York, in fraud of the insolvency laws of Massachusetts. The answer was a general denial. The defendant in error (there the plaintiff) had a verdict, and the case was taken by the plaintiffs in error (there the defendants) on exceptions, to the Supreme Court of Massachusetts.

[Record, pp. 14, 16-18, 21-3, 25-63.]

No Federal questions were raised by the pleadings or otherwise in the Superior Court, or by said exceptions.

Said exceptions were overruled by the Supreme Court.

[Record, p. 63.]

The present plaintiffs in error, then, *after the final judgment* rendered in the Superior Court, March 6, 1899 [Record, pp. 16, 54, 56], brought a writ of error to the said Superior Court in the Supreme Court of Massachusetts.

[Record, pp. 6, 7-13.]

No Federal questions in the Courts below appear anywhere else in the Record, except in the assignment of errors filed in said Supreme Court, and except as referred to in its opinion.

[Record, pp. 8-9, 63-6.]

The writ of error brought as aforesaid in the Supreme Court of Massachusetts was heard by a single justice thereof, and reported to the full bench,

[Record, pp. 2-5.]

where the judgment in the Superior Court was affirmed.

[Record, pp. 63-6.]

The present writ of error was then brought *to the Superior Court* of the State of Massachusetts in this Supreme Court of the United States, and an assignment of errors filed therewith.

[Record, pp. 1-2, 60-1.]

(1)

The original case of Knight, Assignee, vs. Rothschild, in the Superior Court.

[For reference.]

The sections of the insolvency laws of Massachusetts under which the action was originally brought in the Superior Court of Massachusetts, are sections 96 and 98 of Chapter 157 of the Massachusetts Public Statutes, and are as follows:

"Sect. 96. If a person, being insolvent or in contemplation of insolvency, within six months before the filing of the

petition by or against him, with a view to give a preference to a creditor or person who has a claim against him, or is under any liability for him, procures any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer or conveyance, or to be benefited thereby, having reasonable cause to believe such person is insolvent or in contemplation of insolvency, and that such payment, pledge, assignment, or conveyance is made in fraud of the laws relating to insolvency, the same shall be void; and the assignee may recover the property or the value of it from the person so receiving it or so to be benefited."

"Sect. 98. If a person, being insolvent or in contemplation of insolvency, within six months before the filing of the petition by or against him, makes a sale, assignment, transfer or other conveyance of any description of any part of his property to a person who then has reasonable cause to believe him to be insolvent or in contemplation of insolvency, and that such sale, assignment, transfer, or other conveyance is made with a view to prevent the property from coming to his assignee in insolvency, or to prevent the same from being distributed under the laws relating to insolvency, or to defeat the object of, or in any way to impair, hinder, impede, or delay the operation and effect of, or to evade, any of said provisions, the sale, assignment, transfer, or conveyance shall be void, and the assignee may recover the property or the value thereof as assets of the insolvency. And if such sale, assignment, transfer, or conveyance is not made in the usual and ordinary course of business of the debtor, that fact shall be *prima facie* evidence of such cause of belief."

The plaintiff's declaration was in three counts:

(1) The first count was general, stating that defendant owed plaintiff $6,477.50 for goods delivered by the insolvent debtor to defendants according to an annexed schedule. [Record, pp. 16-7.]

(2) The second count (as amended) was framed so as to recover, as assignee, the value of the same goods described in the

schedule referred to in Count 1 (above) under Section 98 of the Mass. Public Statutes (see above) [Record, pp. 21-3].

(3) The third count was framed so as to recover, as assignee, the value of the same goods as referred to under Counts 1 and 2 (above) under Section 96 of the Mass. Public Statutes (see above) [Record, p. 23].

The defendant's answer was a general denial [Record, p. 22].

A.

The Facts in the Original Case.

In the original trial in the Superior Court the facts, as shown in the bill of exceptions [Record, pp. 25-53], briefly, were as follows:

The goods whose value was sought to be recovered by the assignee were a quantity of fur garments conveyed and delivered by McKeon to plaintiffs in error (there the defendants) on December 20, 1895. McKeon was adjudged an insolvent, and the present defendant (there the plaintiff) was chosen assignee of his estate within six months of said time of conveyance of said goods, to wit, on February 20, 1896.

[Record, p. 25.]

On December 19, 1895, McKeon owed the then defendants (here the plaintiffs in error) $3,865 for goods sold, which debt was overdue, and on that day Frank Rothschild, Jr., son of Simon Rothschild, one of said defendants, he being the general agent of said defendants with full power and authority, came to Springfield to see McKeon; previously he had been unable to collect the bill from McKeon, though he had seen and corresponded with McKeon, and had asked him to remit several times;

[Record, pp. 38-9, 47.]

he was unable to find McKeon on that day, though he called eight or ten times, but on the next day he had a con-

ference at the Haynes House with McKeon, there also being present Edward H. Lathrop, who was McKeon's counsel, and C. C. Spellman, Esq., retained by Rothschild in the interest of said defendants.

As to the conversation that took place at the meeting above alluded to, see

Testimony of Lathrop, Exeep., Record, pp. 25-30.
Affidavit of F. Rothschild, Jr., Record, pp. 46-8.
Deposition of F. Rothschild, Jr., Record, 48-9.

McKeon was embarrassed [Record, pp. 29, 31]; Lathrop knew it [Record, p. 29], and he had told McKeon a day or two before that he was insolvent [Record, p. 29].

It will be seen from Lathrop's testimony that Rothschild knew that McKeon was in difficulty, and that Lathrop, besides, there told him and McKeon that McKeon was legally insolvent, and he knew it, and Rothschild knew it [Record, p. 26, 29], and taking any goods out of his stock under those circumstances would be in violation of the Massachusetts insolvent laws, which allowed no preferences [Record, pp. 26, 43, 40-1]; also, from affidavit and deposition of Rothschild, it appears that he said he would assist McKeon if he would secure said defendant's claim [Record, pp. 47-8], or pay it in full [Record, pp. 39-40]; it appears from Rothschild's own testimony [Record, pp. 39, 40, 43] that Rothschild said he was "sorry McKeon was in an embarrassed condition and was willing to help him. I said, of course, one of the conditions would be that he would *pay our claim in full*," and he adds that Lathrop then told him that under the laws of Massachusetts a preference couldn't be created. Lathrop explained to them the Massachusetts insolvency law [Record, pp. 26, 40-1, 43]. Lathrop testified Rothschild wasn't to advance any money *unless he got the property* [Record, p. 28]. Lathrop opposed the proposition. Lathrop withdrew before the conference ended [Record, p. 29]. He said no favor should be shown Rothschild, though he should help McKeon, that it must not be done. [Record, pp. 27-8, 43, 40-1.]

The affidavit of Einstein, attorney of said defendants [Record, pp. 36-7], which is stated to be true by the admission of S. Rothschild, one of said defendants, in his affidavit [Record, p. 35] also showed that McKeon was insolvent, that

said defendants had reasonable cause to believe he was insolvent, and that the goods were delivered as a preference. [See Record, p. 63.]

On the same day, December 20, 1895, McKeon packed the goods, whose value this suit is brought to recover, in three trunks and shipped them to New York, giving bill of the goods and the trunk checks to Rothschild, who went back to New York that night. McKeon told him he "had better mark the bill paid," and he did. [Record, pp. 30, 40, 51-52, 46.]

Immediately on arriving in New York the goods were taken to said defendants' storehouse. [Record, pp. 45.]

F. Rothschild, Jr., testified that the next day the goods were attached in New York in a suit brought in New York against McKeon by said defendants, S. Rothschild & Bro., then replevied by another party, Cohen & Bro., and sold at a sheriff's sale [Record, pp. 37, 41], at which said defendants bought them all. [Record, p. 45.]

Before Frank Rothschild, Jr., left Springfield on December 20, 1895, he, as he testified, gave McKeon a check for $100, for McKeon to make a part payment of a claim against him in the hands of a Springfield attorney, one Carpenter; but defendants never advanced any more money to McKeon or for him to anyone after December 20, 1895 [Record, pp. 45-6], nor did McKeon ever pay Carpenter anything on the claim. [Record, p. 30.]

[The foregoing abstract of the facts appearing in the bill of exceptions in the original case is inserted for reference. It is not believed that these facts enter into the discussion under the present writ of error or concern the questions of law here arising; but it was thought proper to insert such an abstract, in order that the history of the case from the beginning might here appear in a complete form, and be easily understood.]

(2)

The writ of error (Rothschild et al. vs. Knight, Assignee) in the Supreme Court of Massachusetts.

After the exceptions in the original case were overruled [Record, pp. 54, 62-3], the defendants therein brought a writ of error in the Massachusetts Supreme Court, and alleged assignments of error found on pages 8-10 of the Record, which will be hereafter referred to in this brief.

It is only in this assignment of errors that any Federal questions ever appeared or were raised in the Courts below.

To said assignment of errors the present defendant pleaded [see Record, pp. 11-2, 13], said plea being *in nullo est erratum*, with a traverse as to some of the allegations, and also containing allegations of certain facts. See

ELIOT VS. MCCORMICK, 141 Mass. 194-5.

And the writ of errors was heard by a single Justice of said Supreme Court, who found certain facts, and reported the case to the full bench.

[Record, pp. 2-5.]

(a)

Facts found by the single Justice:

Some of the more important facts in connection with the present writ of error that were so found and reported were as follows:

That there was an attachment in the original suit, of goods, effects and credits of plaintiffs in error, by trustee process, in the hands of the trustees who were summoned;

That the writ was duly entered and declaration duly filed;

That there was no personal service on plaintiffs in error (originally defendants), but that there was a service by publication according to an order of the Court;

That defendants in the original suit (i. e., plaintiffs in error) appeared generally by duly authorized attorneys, one of whom tried the case for them;

That the amendments to the declaration were duly consented to by fully authorized counsel, and allowed;

That certain of the trustees were charged by order duly entered according to the established practice, and judgment for plaintiff (here defendant) duly entered.

[See Record, pp. 3-4.]

[The writ of error was heard by the full bench, and the judgment in the original case was affirmed, on May 15, 1900

(Record, pp. 63-6, 59).]

(3)

Questions presented in this Court:

The questions arising in the present case can of course only be Federal questions.

See WATER POWER CO. vs. ST. R. CO., 172 U. S. 475 [487-8.]

Such Federal questions are confined to those that are found in the present assignment of errors [Record, pp. 60-1], and can include *only* such of the latter as appear in the Record, and were raised in the Courts below, as is shown later in this brief.

As has already been stated, and will be shown, no Federal questions appear in the Record of the Courts below, or were anywhere raised, except in the assignment of errors in the Massachusetts Supreme Court [Record, pp. 8-10].

Such questions as are raised in the present assignment of errors, and which also appear to have raised in some form under the writ of error in the Massachusetts Supreme Court, are, principally:

1. Whether the plaintiffs in error have been deprived of their property without due process of law, because it is *alleged*

[without foundation, however, as we show] that there was no valid and effectual attachment, no service on plaintiffs in error by publication or otherwise, and no voluntary appearance by them in the Superior Court.

[See Record, p. 8, 60-1.]

2. The question is proposed, as a Federal question, that the "*judgment*" would "impair the obligation of contracts." [Record, pp. 61, 10.]

3. That full faith and credit were not given to the judicial proceedings of the Supreme Court of the State of New York. [Record, pp. 61, 10.]

4. It is also further attempted to question the validity of certain chapters of the Mass. Public Statutes, [See Record, p. 61.] as impairing the obligation of contracts and depriving plaintiffs in error of their property without due process of law.

POINTS AND AUTHORITIES.

I.

All Federal questions raised below were raised, not in the Superior Court, but in the Supreme Court of Massachusetts on the writ of error brought in said Supreme Court, and appear in the assignment of errors there filed.

(1)

That no Federal questions were ever raised in the case in the Superior Court, or on the exceptions taken to the Supreme Court of Massachusetts, will be clear from an inspection of the Record :

a. See the original pleadings. [Record, pp. 16-8, 21-3.] The answer was merely a general denial [Record, p. 22], and no Federal question was raised.

b. See the exceptions taken by plaintiffs in error (there the defendants). All these exceptions but one were confined merely to objections to the admission of evidence, said exceptions being:

(1) As to the admissibility of the testimony of Lillian Dietz, employed by McKeon, in regard to the value of the goods in question, to which testimony plaintiffs in error objected on the ground she was not qualified to give her opinion as to value [Record, p. 33];

(2) As to the admissibility of the testimony of the present defendant in error as to the fair value of the accounts on McKeon's books against his customers [Record, p. 34];

(3) As to the admissibility in evidence of affidavits of Simon Rothschild and B. F. Einstein and Frank Rothschild, Jr. [Record, pp. 34, 37, 46];

(4) As to the admissibility of testimony of present defendant in error regarding a conversation in New York between himself and Frank Rothschild, Jr., the general agent of plaintiffs in error, wherein he stated that Rothschild offered him the dividend which would come to plaintiffs in error, if their claim was proved in the Massachusetts Insolvency Court, if he would drop the suit in the Superior Court [Record, p. 49];

(5) As to request of present plaintiffs in error, when all the evidence was in, that the Court would rule "that there was no evidence to warrant the finding that McKeon intended to prefer them (there the defendants), or intended to prevent the property from coming into the possession of the assignee, or from being distributed according to the laws relating to insolvency, and that the action could not be maintained." [Record, p. 53.]

In all these exceptions, no Federal questions were raised, or intended to be raised, as is evident from an inspection of them. Only exceptions (1) and (3) [above] were argued. [See c. below.]

c. See the opinion of the Supreme Court in passing upon the exceptions. [Record, pp. 62-3.]

Only the exceptions relating to the testimony of the witness Dietz, and the admissibility of the affidavits were argued [See (1) and (3) above], as is stated by the Court.

Exceptions (2), (4) and (5) (above) were therefore waived.

IASIGI VS. SHEA, 148 Mass. 539.
COM. VS. MCCUE, 121 Mass. 358 (360).

Here, also, there is no trace of any Federal question.

In the said assignment of errors are to be found *the only Federal questions* which appear by the Record ever to have arisen in the courts below.

We now proceed to discuss, below, in detail, the Federal questions attempted to be raised in the case.

II.

The first assignment of error is as follows: —

"1. *That in said suit there was drawn in question the validity of an authority exercised under said State of Massachusetts as being repugnant to Article* 1 *of the fourteenth amendment to the Constitution of the United States, which was specially set up and claimed, in that these defendants were deprived of their property without due process of law, and the decision was in favor of the validity of the authority drawn in question.*" (Record, p. 60-1.)

(1)

No such authority was drawn in question as alleged.

The authority exercised by the highest court of the State of Massachusetts in hearing and determining the case in question *is not the kind of authority which is referred to* in Section 709 of the Revised Statutes, which provides in what cases a writ of error will lie from this Court to a State Court.

No other authority exercised under the State of Massachusetts can possibly be referred to, and no Federal question, therefore, is raised by said assignment of error.

U. S. REVISED STATUTES, Sect. 709.
SNOW VS. U. S., 118 U. S. 346 (353-4).
BETHELL VS. DEMARET, 10 Wall. 537 (540).

Otherwise every judgment of the highest court of a State would be re-examinable under said section of the Revised Statutes.

BETHELL VS. DEMARET (supra).

(2)

Plaintiffs in error were not deprived "without due process of law."

The above assignment of error is vague and indefinite as to why there was not "due process of law." According to the wording of the assignment of error we are confined to points raised in the Court below; nor would this Court examine here any Federal questions not arising there.

CITIZENS SAV. BK. VS. OWENSBORO, 173 U. S. 636 (643) [and cases cited].

The only Federal questions appearing in the Record as raised in the Court below, as pointed out under I. above, are found in the assignment of errors in the Supreme Court of Massachusetts. Further, the allegation is that the matter was "specially set up and claimed," and there is no other place in the Record but said assignment of errors where anything specially set up and claimed or drawn in question is found relating to a Federal question. [See Record, pp. 8-10.]

The only alleged grounds there appearing for the contention that in said suit an authority was exercised "*without due process of law*," are the allegations—

(A) that there was no valid attachment;
(B) that there was no service, personally or by publication, upon plaintiffs in error (there the defendants); and
(C) that they did not voluntarily appear before the Superior Court;
(D) that the declaration was objectionable.

See Record, p. 8 (assignments of error Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11).

A.

There was an attachment in due form by trustee process of debts due the plaintiffs in error (the original defendants) from debtors residing in the Commonwealth of Massachusetts.

This was found as a fact, in the proceedings under the writ of error in the Massachusetts Supreme Court, in the hearing before a single Justice of the Supreme Judicial Court of Massachusetts, before the writ of error was heard by the full bench, as shown by his report.

[Record, p. 3, and see Record, p. 64.]

This Court will go no further, but is concluded by this finding. W. U. Tel. Co v C. P. Co. 181 U.S. 92. (103-4)
EGAN VS. HART, 165 U. S. 188 (189)
[and cases cited].

If it were necessary to go further, the Record shows the fact of this attachment:

[See Record, pp. 14, 15, 16, 18, 19.]

Such an attachment gave jurisdiction to the Superior Court to render judgment.

Record, pp. 64-5 (Opinion of the Mass. Supreme Court).
s. c., ROTHSCHILD VS. KNIGHT, 176 Mass. 48 (53-5).
FREEMAN VS. ALDERSON, 119 U. S. 185 (187-8).
KING VS. CROSS, 175 U. S. 396 (399).
CHICAGO, R. I. &C. RY. VS. STURM, 174 U. S. 710 (714-6).
ELIOT VS. MCCORMICK, 144 Mass. 10 (11-2).

And it made no difference that the attachment was *by trustee process.*

KING VS. CROSS (supra).
CHICAGO, R. I. &C. RAILWAY VS. STURM (supra).
COOPER VS. REYNOLDS, 10 Wall. 308 (317).
OCEAN INS. CO. VS. PORTSMOUTH M. R. CO., 3 Met. 420 (422-3).
FOLGER VS. COL. INS. CO., 99 Mass. 267 (272-3).
Story on Conflict of Laws (7th ed.) Section 592, a.

B.

There was no personal service upon plaintiffs in error (the original defendants), but there was a service by means of notice by publication ordered by the Court, and it was duly given as ordered.

This was found as a fact by the single Justice of the Supreme Court, who heard the case under the writ of error before it was heard by the full bench, as shown by his report.

[Record, p. 3.]

This Court will not inquire further.

W. U. Tel. Co. v. C. P. Co. 181 U. S. 92, (103-4)

EGAN vs. HART, 165 U. S. 188 (189)
[and cases cited].

If it were necessary to go further, see Record, pp. 19-21, and p. 58.

C.

There was a general voluntary appearance of the plaintiffs in error (the original defendants) by duly authorized attorneys, in the usual way, and they made answer, and contested the case at all stages until judgment was rendered.

This was found as a fact by the single Justice of the Supreme Court of Massachusetts, who heard the case under the writ of error before it was heard by the full bench, as shown by his report.

[Record, pp. 3-4]

and see Record, p. 65. [Opinion of the Supreme Court.]
s. c., ROTHSCHILD vs. KNIGHT, 176 Mass. 48 (53).

This Court will not inquire further.

EGAN vs. HART, 165 U. S. 188 (189).

If necessary to go further, the Record shows this.

Record, pp. 56, 21, 22, 24, 26.
Record, pp. 25-53 (bill of exceptions).

Such an appearance gave jurisdiction to the Superior Court, without reference to service.

Record p. 65 (Opinion Mass. Supreme Court).
s. c., ROTHSCHILD vs. KNIGHT, 176 Mass. 48 (53-5).

See Massachusetts Public Statutes, Chap. 167, Sect. 82, which is as follows:

"Sect. 82. A judgment shall not be arrested for a cause existing before the verdict, unless such cause affects the jurisdiction of the court. And *when the defendant has appeared and answered to the merits of the action, no defect in the writ or other process by which he has been brought before the court, or in the service thereof, shall be deemed to affect the jurisdiction of the court.*"

See

FREEMAN vs. ALDERSON, 119 U. S. 185 (188).
PENNOYER vs. NEFF, 95 U. S. 714, 723, 731, 733.
GROVER & BAKER M. Co. vs. RADCLIFFE, 137 U. S. 287 (298).
COOPER vs. REYNOLDS, 10 Wall. 308 (317-8).
WRIGHT vs. ANDREWS, 130 Mass. 149.
LOOMIS vs. WADHAMS, 8 Gray, 557 (561).
ELIOT vs. MCCORMICK, 144 Mass. 10 (11).
GILMAN vs. GILMAN, 126 Mass. 26.
HAZARD vs. MASON, 152 Mass. 268 (270-1).
GLEASON vs. DODD, Admr. 4 Met. 333 (342).
PIERCE vs. EQUIT. LIFE INS. CO., 145 Mass. 56 (57).

In order to show that they were not voluntarily before the Superior Court, it would have been necessary for the plaintiffs in error to show that they *limited the authority* of the attorney who appeared for them, or instructed him to appear *specially*.

WRIGHT vs. ANDREWS (supra).

The facts found by the single Justice of the Supreme Court, however, show the opposite, as above pointed out.

So the rest of the record shows, also.

(See above.)

D.

Any questions regarding the *sufficiency of the declaration* which may be found raised in the Court below in the assignment of errors in the Massachusetts Supreme Court [Record, pp. 8-9], if, indeed, they can be considered at all in connection with the query whether there was "due process of law," are sufficiently answered by referring to the opinion of the Massachusetts Supreme Court.

[Record, p. 65.]

S. C., ROTHSCHILD VS. KNIGHT, 176 Mass. 48 (55-6).

It is there held that the judgment is well supported by the declaration, and that the amendments of the latter were properly allowed, as found by the single Justice. [Record, pp. 3-4.]

All three of the counts (see statement of the case above) had for their object the recovery, by the original plaintiff as assignee in insolvency, of the value of the same lot of goods, to wit, those described in the schedule annexed to the first count, which were fraudulently conveyed or delivered to the original defendants by McKeon, the insolvent debtor. And although count one was not in detail as full as counts two and three, its *import or gist* was plainly the *same*; and all three counts were consistent, as the Supreme Court found. [Record p. 65.]

It is believed that misjoinder of counts, if it existed, presents no Federal question.

McDONALD v. MASS., 180 U. S. 311 (313)
and see G (below).

Though hardly necessary, perhaps, here to allude to the point, it is clear that there was no joinder or misjoinder of counts *in contract* with counts *in tort*, but the declaration contained three counts all of the same import, and all in tort, and it was,

therefore, quite proper that *a general verdict* should be given, since the plaintiffs in error did not move to have defendant in error (there the plaintiff) *elect* under *which* count he would proceed.

MAY VS. WESTERN UNION TEL. CO., 112 Mass. 90 (93).
RICHMOND VS. WHITTLESEY, 2 Allen 230 (234-5).

It would have, even then, been discretional with the Court as to whether plaintiff should elect between the counts or not.

TEAGUE VS. IRWIN, 134 Mass. 303 (307).

[An action of tort is a suitable form of action to recover under those statutes under which the action was brought.

TAPLEY VS. FORBES, 2 Allen, 20 (24).]

Nor, if there *had* been a joinder of counts in *contract* with counts *in tort* in the declaration, would it have amounted to a waiver of the right to such an action. [See Record, p. 10, assignment No. 15.]

CRAFTS VS. BELDEN, 99 Mass. 535 (539).
MORSE VS. HUTCHINS, 102 Mass. 439.
TEAGUE VS. IRWIN, 134 Mass. 303 (307).
MAHON VS. BLAKE, 125 Mass. 477 (480).

E.

The question as to whether or not the writ was entered late [Record, p. 10, No. 14] cannot arise in this connection on the question whether there was "due process of law," for it was waived or abandoned in the Court below by plaintiffs in error at the hearing, as stated by the single Justice in his report. [Report, Record, p. 2.]

The Record does *not* show, in fact, that there was any late entry of the writ. On the contrary the single Justice found as a fact that it was *duly entered*. [Record, p. 3.]

F.

Any questions relating to a "*penalty*" being involved, which were set forth in the assignment of errors below [See Record, p. 9, Nos. 10 and 11], whatever they may be, are not raised in the present assignment of errors [Record, pp. 60-1].

No *penalty* was in fact involved. The action was not for the recovery of a *penalty*, but to recover the value of goods conveyed in fraud of the laws relating to insolvency.

Mass. Public Statutes, Ch. 157, Sects. 96 and 98 (cited above in statement of the case).
(Such a statute was valid; see BROWN VS. SMART, cited below under III and IV.)
Record, p. 65 [Opinion of the Mass. Supreme Ct.]
S. C., ROTHSCHILD VS. KNIGHT, 176 Mass. 48 (56).

It might properly be begun by trustee process.

Mass. Pub. Statutes, Chap. 183, Sec. 1:

"SECTION 1. All personal actions, except actions of replevin and actions of tort for malicious prosecution, for slander either by writing or speaking, and for assault and battery, may be commenced by trustee process. * * * "

G.

This Court will not consider any questions of procedure with relation to the question whether there was or was not "due process of law." The opinion of the Massachusetts Supreme Court will be taken as conclusive on these points.

L. ID. WATER SUPPLY CO. VS. BROOKLYN, 166 U. S. 685 (688.)
LOEBER VS. SCHROEDER, 149 U. S. 580 (585.)

H.

For the above reasons it can hardly be held that plaintiffs in error have been deprived of their property "without due process of law," and also because it appears, in the present case, that they had a full and fair trial in the Superior Court of Massachusetts, and in the Supreme Court on exceptions, and afterwards again in the Supreme Court of Massachusetts on writ of error.

See

CENTRAL LAND CO. VS. LAIDLEY, 159 U. S. 103 (112.)
DAVIDSON VS. NEW ORLEANS, 96 U. S. 97 (105).
KENNARD VS. LOUISIANA, 92 U. S. 480 (481, 483).

III.

The second assignment of error is as follows: —

"2. *That in said suit there was drawn in question the validity of an authority exercised under said State of Massachusetts as being repugnant to Article* 1, *Section* 10, *of the Constitution of the United States, which was specially set up and claimed, and the decision was in favor of the validity of the authority drawn in question.*" [Record, p. 61.]

(1)

No such authority was drawn in question as alleged.

It may here be stated, as above under II. (1), that the authority exercised by the highest Court of the State of Massachusetts in hearing and determining the case in question, is *not the kind of authority which is referred to* in Section 709 of the Revised Statutes, which provides in what cases a writ of error will lie from this Court to a state Court.

No other authority exercised under the State of Massachusetts can possibly be here referred to, and no Federal question is therefore raised by this assignment of error.

U. S. Revised Statutes, Sect. 709.
SNOW VS. U. S. 118 U. S. 346 (353-4).
BETHELL VS. DEMARET, 10 Wall. 537 (540).

Otherwise every judgment of the highest Court of a State would be re-examinable under said section of the Revised Statutes.

BETHELL VS. DEMARET (supra).

(2)

Nor was any Federal question raised below as to any authority exercised repugnant to Article 1, *Section* 10, *of the Constitution.*

As shown under I. above, no Federal questions below appear, nor are "specially set up and claimed," except in the assignment of errors in the Massachusetts Supreme Court, and to these we are confined here. (See II. (2) above.)

[See Record, pp. 8-10.]

Upon examination, we find no question in the said assignment of errors which can involve the question set up in the above second assigned error, except the assertion contained in No. 16, stating that "*the judgment if allowed to stand, will impair the obligation of contracts.*"

[Record, p. 10 (No. 16).]

The provision is found in Article 1, Section 10, of the Constitution, that "no State shall . . . pass any . . *law impairing the obligations of contracts.*"

U. S. Constitution, Article 1, Sect. 10.

The only question raised by said assignment of error is, therefore, that "*the judgment*" will impair the obligation of contracts, as shown above.

There is no question here raised at all about the State of Massachusetts passing any "*law*" impairing the obligation of contracts; it was only insisted that the "*judgment*" would do so. This raises no Federal question at all. This Court will not review a "*judgment*" of the highest Court of a State because it might impair the obligation of contract.

MORLEY VS. LAKE SHORE R. Co., 146 U. S. 162 (171, bottom),

and see

ARROWSMITH VS. HARMONING, 118 U. S. 194 (195-6).
N. O. WATERWORKS VS. LA. SUGAR CO., 125 U. S. 18 (30).

Moreover, what contracts are referred to by the assignment of error is not stated, but is left entirely indefinite.

The contract should appear in the Record, if there *is any contract*, the impairment of the obligation of which could be questioned under the assignment of error.

RED RIVER CATTLE CO. VS. SULLY, 144 U. S. 209.
N. ORLEANS VS. N. O. WATERWORKS CO., 142 U. S. 79 (88).
ST. PAUL GAS LT. CO. *vs.* ST. PAUL, 181 U. S. 142 (147).

It is believed that this assignment of error needs no further discussion, for the reasons stated above. But we proceed, nevertheless, in order to make our argument complete. No question as to the statutes having been brought to the Court's attention below, its decision could hardly be said to necessarily involve them; but we discuss them below.

A.

There were no pre-existing contracts to be impaired by the insolvency statute; and they must have been pre-existing, or else the provision as to impairment of obligation does not apply.

It does not appear that the original contract of plaintiffs in error with McKeon, nor any other contract alluded to in the Record, as, for instance, that of the trustees (summoned by the original trustee process) with plaintiffs in error, or any contract with McKeon (see statement of the case), *was in existence when the insolvency laws of Massachusetts were passed*, and the burden would be on planitiffs in error to show this.

Since none of the contracts alluded to in the Record, even had they been sufficiently set forth, were shown to have been in existence when the insolvency laws were passed, therefore the question whether the obligation of any of such contracts was thereby impaired is not before this Court, as it is not a Federal question.

BROWN VS. SMART, 145 U. S. 454 (457-8).
DENNY VS. BENNETT, 128 U. S. 489 (494-5).
LEHIGH WATER CO. VS. EASTON, 121 U. S. 388 (392).
R. CO. VS. MCCLURE, 10 Wall. 511 (515).

It may be mentioned that Sections 96 and 98 of Chap. 157 of the Massachusetts Public Statutes, before alluded to as being those concerning preferences, and under which the original action was brought, are the same as Sections 89 and 91 of Chap. 118 of the General Statutes of Massachusetts which were in existence in A. D., 1860.

Massachusetts could pass an insolvent law, provided it did not "impair *the obligation of existing contracts*."

BROWN VS. SMART (supra, p. 457, 458).
CENTRAL LAND CO. VS. LAIDLEY, 159 U. S. 103 (111.)
DENNY VS. BENNETT (supra, p. 497).

B.

No obligation of contracts was impaired.

Also for the following reasons it is submitted that of *no contracts* alluded to in the Record was the obligation impaired by the judgment, nor by the insolvent laws (assuming the latter could be here considered).

By the "obligation of a contract" is meant, in the Constitution, *the means which, at the time of its creation, the law affords for its enforcement.*

NELSON VS. ST. MARTIN'S PARISH, 111 U. S. 716 (720).
Constitution of the U. S., Art. I, Sect. 10.

Taking this definition, it is clear that there has been no impairment of the obligation of any contract set forth in the Record.

The law authorizing an attachment of the credits in the hands of the trustees merely took away from plaintiffs in error the right to receive such credits, if jurisdiction were obtained over said plaintiff in error and a judgment recovered against them, the same as any attachment and judgment would do; it did not make any change in the "*means*" *afforded by law* for plaintiffs in error to enforce their contract with the trustees, and the same is true of any contract with McKeon.

C.

Nor does it appear that any contracts ante-dated the trustee process statutes.

Nor does it appear that the Massachusetts Statutes regarding trustee process were passed *subsequently* to any contract alluded to in the Record. And unless such contracts existed *previously* to such statutes, the latter could not be questioned as impairing the validity of the obligations of such contracts. The burden was on plaintiffs in error to show such pre-existence, if there was such. See A (above).

D.

And it was proper to attach credits due non-residents.

There was no objection to the trustee process, because under it were attached credits due non-residents, to wit, plaintiffs in error.

KING vs. CROSS, 175 U. S. 396 (399) [supra].
CHICAGO, R. I. &C. R. vs. STURM, 174 U. S. 710 (714-6) [supra].
ROTHSCHILD vs. KNIGHT, 176 Mass. 48 (53-5) [supra]. (s. c., Record, pp. 64-5).
See II, (2), A (above).

E.

The provisions of the Massachusetts insolvent law were valid. If we ought to pursue this discussion further, it is believed and respectfully submitted that plaintiffs in error must be strictly confined to Federal questions raised below,

and that under this rule, and also for the reasons above shown, they cannot, under this second assignment of error, discuss the validity of any part of the insolvency laws of Massachusetts. See II (2) (above).

If, however, they could do so, they could question only the Sections 96 and 98 of Chap. 157 of the Mass. Public Statutes, regarding *preferences*, which are cited in full in the "statement of the case" (above) in this brief, and under which the original action was brought.

And a sufficient answer to such a challenge of the validity of these sections of the statute is that "each State has full authority to pass insolvent laws binding persons and property within its jurisdiction, provided it does not impair the obligation of existing contracts";

BROWN VS. SMART, 145 U. S. 454 (457).

See A (above) and cases cited.

and "a provision of the insolvent law of a State, that all conveyances by way of preference, of any property within its borders, made by a citizen of the State, being insolvent, and within four months before the commencement of proceedings in insolvency, shall be void, is a usual and a valid exercise of the power of the State over property within its jurisdiction, as to all such conveyances made after the passage of the law, whether to its own citizens or to citizens of other States."

BROWN VS. SMART, 145 U. S. 454 (458).

[Of course the same would be true, where it was similarly provided with regard to conveyances made within *six* months before commencement of insolvency proceedings, as in the present case.]

From this it follows, also, that the provision in said statute providing for a recovery of the value of the goods conveyed in preference to the non-resident plaintiffs in error, by means of an action against them, was proper, and the suit would be effective when jurisdiction was obtained over them, as in the original suit here in question.

We do not contend that the insolvency law of Massachusetts could *discharge* McKeon from his original contract with plaintiffs in error *unless they became parties to the insolvency proceedings.*

BROWN VS. SMART (supra, p. 457).

Nor does this question of discharge come up in this case, since there is here no appeal or writ of error from the insolvency proceedings in McKeon's case.

Nor does it appear that McKeon's original contract with plaintiffs in error was made and to be performed in New York, even if his usual course had been to send them checks in payment, though it is immaterial.

But the property conveyed by McKeon to plaintiffs in error December 20, 1895, was then within the jurisdiction of the State of Massachusetts and the scope of its insolvency law, and the conveyance was made within the State.

Nor were the trustees summoned in the original suit released from their obligation to pay the amount of their debts owed the plaintiffs in error, but these credits were attached by the trustee process, by the defendants in the original suit, as it has been held may properly be done against a non-resident defendant. See D (above).

This of course substituted the defendant for plaintiffs in error as those entitled to receive the money owed, as in every case where trustee process is brought.

[See cases under II, (2), A, as to trustee process.]

And that defendant had there a good right of action by a valid statute of Massachusetts is shown above.

BROWN VS. SMART (supra).
See A (above) and cases cited.

IV.

The third assignment of error questions the validity of Chapter 157 *of the Public Statutes of Massachusetts, stating that such validity "was drawn in question" in said suit "as being repugnant to Article* I, *Section* 10, *of the Constitution."*

[See Record, p. 61.]

[Chapter 157 is the Insolvency Statute of Massachusetts.]

It is believed that the Record does not show that any statute of Massachusetts was drawn in question, either in the Superior Court or in the Supreme Court of Massachusetts.

No statute or chapter of the Statutes of Massachusetts is mentioned in the assignment of errors in the writ of error in the Supreme Court of Massachusetts, as being questioned with reference to validity.

[See Record, pp. 8-10.]

There is only (a) a reference to "an attempt to obtain jurisdiction over these non-resident plaintiffs in error by *trusteeing* a debt due them;" (see Record, p. 8, No. 2.)

(b) a statement that the declaration in the original suit involved a penalty "*under the laws of this Commonwealth*," and another reference to the "attempt to obtain jurisdiction" "*by the trustee process.*" (See Record, p. 9, No. 11.)

These meagre allusions to the "trustee process" and the "laws of this Commonwealth" cannot justify plaintiffs in error in discussing Chapter 157 of the Public Statutes of Massachusetts before this Court, especially since even in these references there does not appear to be any question of the validity of the Statutes of the Commonwealth in general, or of the trustee process, or any *mention of the Insolvency Statutes.*

It is believed that the third assignment is an attempt to introduce into the Record Federal questions not lawfully found therein.

See CITIZENS SAV. BANK vs. OWENSBORO, 173 U. S. 636 (643).

In order to be considered here, any Federal question should have been presented to the State Court, or in some way have been called to its attention; it must have been raised and must appear in the Record, and have been decided, or the decision thereof have been necessarily involved in the decision of the case.

E. BUILDING &C. A. vs. WELLING, 181 U. S. 47 (49).
and cases cited.
WATER POWER CO. vs. ST. R. CO., 172 U. S 475 (488).
CITIZENS SAV. BANK vs. OWENSBORO, 173 U. S. 636 (643).
CHAPIN vs. FYE, 179 U. S. 126 (129-130).

The question has been already dealt with above under III.

(A)

The insolvency statute under which the suit was brought was valid; no "obligation of contracts" was impaired or could here be claimed to be impaired.

If, however, it is necessary to answer the challenge of the validity of the insolvent law, we are confined to the assertion that it is repugnant to Article I, Section 10, of the Constitution, which can only mean that it is a law passed by the State of Massachusetts impairing the "obligation of contracts."

U. S. Constitution, Article I, Sect. 10.

For the answer to this we respectfully refer to the argument under III (E, and B and A) (above). It is there shown:

(a) that the provisions of the insolvency law under which the original suit was brought are valid, according to decision in

BROWN VS. SMART, 145 U. S. 454 (458);
and other cases cited.

(b) that no "obligation of contract," according to the true meaning of the phrase, was impaired with reference to any contract alluded to in the Record, citing

NELSON VS. ST. MARTIN'S PARISH, 111 U. S. 716 (720).

(c) that the contracts the obligation whereof the obligation is claimed to be impaired under the said clause of the Constitution must be *pre-existing* contracts, and the plaintiffs in error do not show that any contracts even alluded to in the Record were in existence previous to the Insolvency Statute; citing

BROWN VS. SMART, (supra), (p. 457–8).
CENTRAL LAND CO. VS. LAIDLEY, 159 U. S. 103 (111).
and other cases cited.

It was also shown that any contract so asserted to be impaired, ought to be set forth in the Record, which is not the case here, citing

RED RIVER CATTLE CO. VS. SULLY, 144 U. S. 209.
N. O. VS. N. O. WATER WORKS CO. 142 U. S. 79 (88-9).
(See III, and cases cited.)

(B)

No question can here be raised about any other provisions of the insolvency law relating to proof of claims, or other proceedings in the insolvency court, as they are not involved in this case.

If they could be here properly discussed, the above cited decision in *Brown vs. Smart* (supra) is decisive as showing that the insolvency law prohibiting proof of claims by a preferred creditor is valid and binding.

V.

The fourth assignment of error asserts that the validity of Chapters 164 *and* 183 *of the Massachusetts Public Statutes was "drawn in question" "in said suit" as repugnant to Article I of the fourteenth amendment to the Constitution, as depriving the "non-resident plaintiffs in error of their property without due process of law."*

[Record, p. 61.]

Chap. 164 is as to *proceedings against absent defendants.*
Chap. 183 is in regard *to the trustee process.*

These statutes were not mentioned at all, or questioned as to their validity, in the Superior or Supreme Court of Massachusetts. No reference to them is found in the assignment of errors in the Supreme Court. [See Record, pp. 8–10.]

It is believed that the validity of these statutes cannot be questioned here, because it involves a new Federal question, and the same objections exist as with regard to the consideration of the insolvency statute, which are stated under IV (above), to which reference is asked.

(A.)

If, however, it is necessary here to answer the challenge of the validity of these statutes, we reply that it is shown under II that there *was a valid attachment* by trustee process, that the defendants (the present plaintiffs in error) voluntarily *appeared generally by fully authorized counsel* and contested the suit, and that these and other considerations as set forth under II show conclusively that there *was* "due process of law," and remove any need of further examination of the chapters above mentioned of the Public Statutes of Massachusetts.

We ask leave to refer to the argument and authorities under II (above).

It is there shown that the trustee process could properly be employed to attach debts due non-residents.

It is there shown that the general voluntary appearance of plaintiffs in error gave jurisdiction, even without reference to *service* upon them, and it is unnecessary to consider the provisions of Chap. 164 as to service any further.

See II (above).

(1.)

No penalty involved.

If any answer were needed, under this assignment of error to the statement asserted below that a "penalty" was involved by the suit in question, it is believed that a sufficient answer has already been given under II, above referred to.

Further, the action in question was not for the recovery of a "*penalty*," but to recover the value of goods conveyed in fraud of the laws relating to insolvency.

Record, p. 65 (Opinion of the Mass. Supreme Ct.)
s. c., ROTHSCHILD vs. KNIGHT, Assignee, 176 Mass. 48 (56).

It is believed that this Court will follow the above adjudication of the Massachusetts Supreme Court that no penalty was involved in the suit under said statute.

KNIGHT vs. U. S. LAND ASSOC'N. 142 U. S. 155 (160).

And, besides, it has already been shown by the decision of this Court in *Brown vs. Smart* (supra) that the section of the insolvency law making void the preference to a non-resident, was valid and proper, and the action provided for the recovery by the assignee of the value of goods conveyed by way of preference to the plaintiffs in error, was a reasonable and logical corollary thereto.

See III, E (above).

The argument, under II, that there was "due process of law," under the attachment by trustee process, with the general appearance of plaintiffs in error, we again refer to, though it is perhaps hardly necessary, to complete our answer to the matter of "penalty."

VI.

The fifth and last assignment of error asserts that "full faith and credit" was not given "to the judicial proceedings of the Supreme Court of the State of New York," as required by Article IV, *Section* 1, *of the Constitution.*

[See Record, pp. 61 and 10 (No. 17).]

(1)

No judicial proceedings were in evidence.

It does not appear that any judgment or judicial proceedings of a court in the State of New York were put in evidence, and the only suit in that State even mentioned in the Record was not a suit to which the present defendant was a party.

Record, p. 66 (Opinion of Mass. Supreme Court).
s. c., ROTHSCHILD vs. KNIGHT, Assignee, 176 Mass. 48 (56).

The plaintiff in the original suit (here the defendant) merely introduced copies of certain affidavits taken in the suit in New York, wherein plaintiffs in error sued McKeon, and attached the goods he had conveyed to them, as soon as said goods reached New York. (See statement of facts in the original case.)

See affidavits of S. Rothschild (Rec. p. 35).
affidavit of F. Rothschild, Jr. (Rec. pp. 46-8).
affidavit of B. F. Einstein (Rec. pp. 36-7).

These affidavits were introduced as admissions tending to show facts material *to the then plaintiff's case*, and also as contradicting certain testimony of witnesses of defendants (the present plaintiffs in error).

[See Record, p. 63 (Opinion of Mass. Supreme Court)],

but they were not the record of any *judgment*, or judicial proceedings, of a New York Court.

There was some testimony in the Record (see p. 45) that after the said goods were conveyed into New York and attached as aforesaid, by plaintiffs in error, and then replevied and sold at a sheriff's sale, and plaintiffs in error bought them all

(See statement of facts in original case) (above);

but this was not evidence of any *judgment*, or judicial proceeding, of a New York Court. Nor does it appear whether McKeon appeared in the suits, or whether there was any trial or judgment. Nor does the Record anywhere show what was subsequently done in said suit, or what judicial proceedings there were in it.

Even if there was testimony to be found in the Record (as there is not) with regard to any judicial proceedings in New York, it would not be sufficient to force a Massachusetts Court to give faith and credit to such proceedings *unless proved in the manner prescribed by Congress* in obedience to the Constitution.

For the Constitution provides in the same section that Congress may, "by general laws, prescribe the manner in which such * * * proceedings shall be proved, and the effect thereof."

Constitution of the U. S., Art. IV, Sect. 1.

And Congress has provided that such judicial proceedings "shall be proved, or admitted in any other Court within the United States, by the attestation of the clerk, and the seal of the Court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that

the said attestation is in due form. And the said records and judicial proceedings, *so authenticated*, shall have such faith and credit given to them in every Court within the United States as they have by law or usage in the Courts of the State from which they are taken."

U. S. Revised Statutes, Section 905.

In the above statute the method of proof of foreign judicial proceedings is prescribed. *Unless so proved*, no state would be bound to give faith and credit to the judicial proceedings of another state.

But here the Record discloses no proof of this kind (*or, indeed, any other*) as having been given of *any* judicial proceedings of the Courts of New York.

Hence there could have been no failure to give full faith and credit, as erroneously alleged in said assignment of error.

Moreover, had there been evidence in due form, namely, that any New York judicial proceedings existed which constituted a defense for plaintiffs in error (there defendants) in said case, it would, even if such judicial proceedings were shown, *in all cases* have been necessary to show that such proceedings took place in a court having jurisdiction of the cases and the parties, in order to make them entitled to full faith and credit here.

GROVER & BAKER M. CO. VS. RADCLIFFE, 137 U. S. 288 (294).
GILMAN VS. GILMAN, 126 Mass. 26 (27).
SEWALL VS. SEWALL, 122 Mass. 156 (161).
FOLGER VS. COL. INS. CO., 99 Mass. 267 (273).
CARLETON VS. BICKFORD, 13 Gray, 591 (593-4).

Even if properly proved, it would *not have been enough* for plaintiffs in error to show that there was an attachment, then a replevin, and a sheriff's sale in New York (if that is what the assignment of error refers to).

The sheriff's sale might have been previous to a judgment, as of perishable goods. We cannot assume a judgment from it, and the Record goes no further.

A.

The New York judicial proceedings, if proved, would have been immaterial.

But even if there *had* been proved a judgment against McKeon in the New York suit brought against him by plaintiffs in error, in which they attached the goods in question, and subsequently a replevin suit in which they bought them at a sheriff's sale, it is respectfully submitted that it would have no weight in this case, or anything to do with it.

Of course the Massachusetts insolvent law could not discharge McKeon from his contract with plaintiffs in error unless they appeared and submitted to the proceedings in the Massachusetts insolvency court. But, as shown by the decision in *Brown vs. Smart*, so often previously cited in this brief, the Massachusetts insolvent law as to making preferences void and giving a right of action to the assignee to recover the value of goods conveyed as a preference to a non-resident, *was valid*.

BROWN VS. SMART (supra).

See III, E, (above).

The assignee could enforce his remedy by a suit, *provided* jurisdiction could be obtained over the preferred non-resident, as was done in the present case.

The judgment or judicial proceedings in the suit against McKeon in New York, if they existed, could have nothing to do with this case, and could not have availed the plaintiffs in error as a defense, even had such judicial proceedings been proved. They were absolutely immaterial.

This writ of error should, therefore, be dismissed.

Respectfully submitted,

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for Defendant.